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IN THE

Supreme Court of the United States

OCTOBER TERM 1993

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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APP

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If plaintiffs had their way, this case would have been decided on different grounds below. To argue that this case is not the best vehicle for the questions presented, plaintiffs seek to confine the Third Circuit's decision to asserted facts that are either contrary to the record or immaterial. Their efforts serve only to highlight that this case presents the questions for which review is sought in their starkest form: The challenged construction and application of ERISA § 402(b)(3) overrides an expressly reserved right to amend, strikes a term from the plan documents, and restores employee welfare benefits that the plan sponsor had the acknowledged right to terminate.

Plaintiffs argue, for example, that the disputed amendment was incorporated only in a summary plan description and not

in a "governing document" of the plan. (Opp. Br. 2, 4). But the Court of Appeals accepted the District Court's finding to the contrary. The District Court specifically found that the 1983 revised plan description, incorporating the challenged amendment, was the plan document controlling the terms of the plan:

> The Court must . . . look to the 1983 booklet without [the invalidated] amendment as the governing document [of the plan].

(A.38).

There is no need to resolve the further issues plaintiffs try to inject. Plaintiffs make much ado about the testimony of the Curtiss-Wright executives who had drafted the amendment, distinguishing between a "clarification" of existing plan terms (because those terms already reserved Curtiss-Wright's right to terminate the plan for any reason at any time) and an "amendment" substantively changing those terms. (J.A. 1142, 1236-39). But this semantic conundrum is immaterial here. The District Court recognized that the revised language added to the plan, whether called an amendment or a clarification, was intended to be a plan term; the only difference was whether it substantively changed the plan. (App. 36-37). The revised language was incorporated in the "governing document" setting forth the plan terms,[1] (A.38); the District Court held that it was an amendment, (A.36); and the Third Circuit premised its decision on the revision's status as an amendment. (App. 6-7). No theoretical distinction between amendment and clarification affects the Third Circuit's analysis or the breadth of its holding.

To invalidate the amendment here, the Court of Appeals relied exclusively on its conclusion that the plan failed to

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[1] While plaintiffs refer to this as "casual redrafting," the amendment was drafted and inserted into the plan by the same company executives who had established the plan constitution in 1976 and who were responsible for administering the plan. (J.A. 1141-42, 1204, 1235-36).

comply with § 402(b)(3), (App. 10-11), essentially acknowledging that the amendment met all other prerequisites of a valid amendment. (App. 9, n.4). Indeed, in other cases, the Third Circuit repeatedly had declined to decide the validity of plan amendments based on the absence of amendment procedures because it was not necessary to do so. (App. 9-10). Here, by contrast, it concluded that "this case requires that we now reach that issue." (*Id.*)

This case thus presents the questions for which review is sought without complication. Under the decision below, an amendment is invalid whether or not there is an express right to amend the plan, whether or not the amendment is incorporated in the plan documents distributed to participants, and whether or not the affected benefits are vested. This broad impact threatens countless plans and the sponsors, administrators, and other fiduciaries associated with those plans, and warrants this Court's review.

Respectfully submitted,

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